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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, and EDWIN SHIMODA,
Petitioners,

VS.

DELBERT KAAHANUI WAKINEKONA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL A. LILLY
First Deputy Attorney General
State of Hawaii
COUNSEL OF RECORD
State Capitol
Honolulu, Hawaii 96813
(808) 548-4740
Attorney for Petitioners

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED FOR REVIEW

1. Whether state-created prisoner pre-transfer hearing rules, which do not limit or proscribe prison official discretion in any way, trigger the Due Process Clause of the United States Constitution?

2. Whether state-created regulations guaranteeing prisoners specified procedural protections before any transfer involving a potential "grievous loss" and defining an interstate transfer as a "grievous loss," but which contain no standards proscribing official discretion in any way, create a liberty interest subject to due process protection?

3. Whether the allegation that a prisoner was denied an independent hearing body guaranteed by State regulations, where the hearing body merely makes a recommendation to the ultimate decision-maker whose discretion is not proscribed or limited in any way by the recommendation, states a claim under 42 U.S.C. § 1983?

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners Antone Olim, Edith M. Wilhelm, John Smythe, Winton Leong, and Edwin Shimoda, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is attached to this Petition as Appendix A.

Its Order and Amendment of Opinion is attached hereto as Appendix B. That decision reversed the judgment of the United States District Court for the District of Hawaii, attached hereto as Appendix C.

The Ninth Circuit decision was published in the advance sheets as 646 F.2d 378, but was withdrawn from the bound volume at the request of the court. The District Court of Hawaii decision was published as *Wakinekona v. Olim*, 459 F. Supp. 473 (D.Hi. 1978).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 26, 1981 (Appendix A, at A-1). The judgment was amended on November 27, 1981 (Appendix B, at B-1). The Petitioners' Motion for Reconsideration and Suggestion for Rehearing *En Banc* was denied on November 27, 1981 (Appendix B, at B-1). The majority of the Ninth Circuit voted against rehearing (Appendix B, at B-1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Hawaii Revised Statutes, Section 353-18:

> § 353-18 *Transfer of prisoner to federal institution.* The director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care, and proper employment of such a prisoner.

42 U.S.C. § 1983, *Civil action for deprivation of rights:*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

REGULATION INVOLVED

Rule IV of the Supplemental Rules and Regulations of the Corrections Division of the State of Hawaii, which is the subject of the Petition, is attached hereto as Appendix D.

STATEMENT OF THE CASE

Respondent, sentenced to life imprisonment without parole by a Hawaii state court, was an inmate of the maximum control unit of the Hawaii State Prison. "He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system." Appendix A, at A-2.

On August 10, 1976, Respondent appeared before a prison program committee to evaluate his overall prison placement, including the possibility of a mainland transfer. After the hearing, the committee recommended to the prison administrator that Respondent be transferred to the mainland. Appendix A, at A-2.

The prison administrator affirmed the recommendation and transferred Respondent to Folsom State Prison in California. Under Rule IV, the administrator had plenary and unfettered discretion to "[a]ffirm or reverse, in whole or in part, the recommendation" of the program committee. Appendix D, at D-5.

Respondent filed suit in the United States District Court for the District of Hawaii, alleging, *inter alia*, that the procedures adhered to in his transfer hearing were in violation of the Due Process Clause of the United States Constitution.

The District Court dismissed the complaint on the ground that, under Rule IV (Appendix D), the prison administrator had unlimited discretion, not subject to standards governing the exercise thereof, to transfer prisoners to the mainland. It therefore concluded that since Respondent's transfer did not implicate a constitutionally protected liberty interest, due process did not attach. *See* Appendix C.

The United States Court of Appeals for the Ninth Circuit, in a split (2 to 1) decision, reversed on the ground that the right to a state-guaranteed procedural hearing in Rule IV creates a "justifiable expectation" in having a hearing before transfer and thus triggers the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See* Appendix A. The Ninth Circuit nevertheless

recognized that its conclusion was in conflict with the "First, Second, and Sixth Circuits." Appendix A, at A-7.

Petitioners filed a Motion for Reconsideration and Suggestion for Rehearing *En Banc* alleging, *inter alia*, that a recent Hawaii Supreme Court case (*Lono v. Ariyoshi*, Hawaii, 63 Haw. ...., 621 P.2d 976 (1981) (Appendix E hereto)) held that Rule IV's hearing procedure did not trigger due process protections:

> Thus . . . Rule IV of the Rules did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States Constitution. Appendix E, at E-11.

The Ninth Circuit denied the motion in a split, 2 to 1, decision on November 27, 1981. *See*, Appendix B.

Your Petitioners now seek a Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The prisoner Respondent invoked the jurisdiction of the District Court below by a complaint under 42 U.S.C. § 1983, alleging a violation of the Due Process Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I

THE CLOSELY DIVIDED NINTH CIRCUIT DECISION CONFLICTS WITH ITS OWN PRIOR OPINIONS AND THE OPINIONS OF EVERY OTHER COURT TO HAVE CONSIDERED THE CONSTITUTIONAL EFFECT OF PROCEDURAL RULES

The Ninth Circuit's closely divided, 2 to 1, decision stands alone in holding that procedural rules trigger due process

protections. As Circuit Judge Goodwin lamented in his dissent below:

> Because I agree with the reasoning of the first and second circuits, *I must respectfully dissent from the majority's unnecessary creation of a conflict among the circuits on this point.* (Emphasis added) Appendix A, at A-14.

It is therefore imperative to grant certiorari to eliminate the irreconcilable conflict among the courts on this issue.

Firstly, the Ninth Circuit decision conflicts with its own prior holdings that "[p]rocedural guarantees ordinarily do not transform a unilateral expectation into a constitutionally protected interest." *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980). *Accord, Hayward v. Henderson*, 623 F.2d 596, 597 (9th Cir. 1980). (Right to CETA procedural protections before termination "does not establish a property interest.").

Secondly, the Ninth Circuit decision conflicts with the Hawaii Supreme Court which held that Rule IV "did not clothe plaintiff with the requisite liberty interest which would have triggered the application of the procedural requirements under the fourteenth amendment of the United States Constitution." *Lono v. Ariyoshi, supra.* Appendix E, at E-11. The Ninth Circuit held that "[on] that federal question [*i.e.*, the Fourteenth Amendment], we respectfully disagree with the Supreme Court of Hawaii." Appendix B, at B-3.

Thirdly, every other Circuit Court of Appeals which has ruled on this issue disagrees with the Ninth Circuit:

> *FIRST CIRCUIT: Lombardo v. Meachum*, 548 F.2d 13, 15-16 (1st Cir. 1977) (Where there are no substan-

tive limitations on an administrator's discretion, the right to procedural safeguards does not create substantive protections.); and *Four Certain Unnamed Inmates of Mass., Etc., v. Hall*, 550 F.2d 1291, 1292 (1st Cir. 1977) ("Prison regulations which grant a right to hearings prior to transfer do not trigger the Due Process Clause.").

SECOND CIRCUIT: Cofone v. Manson, 594 F.2d 934, 938 (2d Cir. 1977) (No liberty interest "entitlement can derive from a statute that merely establishes procedural requirements."); *Boothe v. Hammock*, 605 F.2d 661, 664-665 (2d Cir. 1979) ("The State *procedural* requirements that he alleges have not been observed do not create interests entitled to due process protection . . . ."); and *Pugliese v. Nelson*, 617 F.2d 916, 824 (2d Cir. 1980).

FOURTH CIRCUIT: Peterson v. Davis, 421 F.Supp. 1220 (E.D. Va. 1976), *aff'd*, 562 F.2d 48 (4th Cir. 1977) (Affirmed a decision which held that promulgated transfer hearing procedures do not trigger due process and thus hearings were "not constitutionally required.").

SIXTH CIRCUIT: Lake Mich. Col. Fed. of Teach. v. Lake Mich. Com. Col., 518 F.2d 1091, 1095 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976) (Right of public employee to pre-termination hearing does not rise to "the level of a protected property interest" because the regulation contains no "substantive grounds for discharge, and it gives no assurances, conditional or otherwise, of continued public employment."); and *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) ("[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest.").

SEVENTH CIRCUIT: Suckle v. Madison General Hospital, 499 F.2d 1364, 1366 (7th Cir. 1974) ("Procedural protections or the lack thereof do not determine whether a property right exists. . . . Rather, plaintiff must show a substantive restriction on the hospital's discretion, namely, that reappointment may be denied only for certain reasons under state law.").

The Ninth Circuit opinion, however, held that "[to] the extent that these cases [*i.e.*, those of the First, Second and Sixth Circuits] may be read as holding that no procedural requirements can create a substantive liberty interest, unless the events which may cause a transfer are specified in those requirements, *we must disagree.*" (Emphasis added.) Appendix A, at A-7.

Finally, the Ninth Circuit conflicts with this court's opinion in *Bishop v. Wood*, 426 U.S. 341 (1976), which squarely held that the denial of state-required pre-termination procedures "did not deprive him [the discharged employee] of a property interest protected by the Fourteenth Amendment."

The Ninth Circuit's conflict with the rest of the nation can and should be remedied at this time by this court.

II

THE NINTH CIRCUIT DECISION INVOLVES IMPORTANT QUESTIONS REGARDING THE NATURE OF DUE PROCESS RIGHTS, IN THE CONTEXT OF STATE-GUARANTEED PROCEDURAL REGULATIONS, WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The considerable confusion generated by the Ninth Circuit's decision, in its diametric opposition to every other

opinion on the subject, is clear. The decision not only fosters confusion and frustration in the law of due process, but also in the day-to-day administration of government agencies, whether they be prisons, schools, police departments, or any other agency that operates under procedural regulations. The need for a decision at the national level is obvious and of paramount importance.

A review of the case law indicates that government agencies often create the right to pre-termination or pre-transfer hearing procedures. In all of these cases, with the exception of the one below, it was concluded that so long as the rules confer discretion, no liberty interest is implicated in the exercise of that discretion. To rule otherwise would result in the constitutionalization of state procedural rules and regulations.

The range and impact of such a constitutionalization would be immense. It would expand the boundaries of the Due Process Clause far beyond those contemplated by this court, for example, in *Bishop v. Wood, supra.* It would, in effect, establish the right to constitutional due process prior to: the termination of the policeman in *Bishop v. Wood, supra*; the transfer of the prisoners in *Lombardo v. Meachum, supra*; the termination of the probationary employee in *Sherman v. Yakahi*, 549 F.2d 1287, 1291 n. 8 and 9 (9th Cir. 1977); the termination of the CETA employee in *Hawyard v. Henderson, supra*; or the denial of hospital reappointment in *Suckle v. Madison General Hospital, supra.*

To allow the Ninth Circuit decision to stand would be to uphold the Court's "unnecessary creation of a conflict

among the circuits on this point." Dissent of Circuit Judge Goodwin, Appendix A, at A-14. It would also have a major impact upon the State of Hawaii since many inmates have been transferred to the mainland since Wakinekona's transfer.

It further reverses the Hawaii Supreme Court opinion in *Lono, supra,* Appendix E, and, therefore, works an injustice on the axiom that federal courts ought to defer to state courts the interpretation and operative effect of state rules and regulations.

For these reasons, the issue before this court on certiorari is of national significance and is one which demands resolution at this time.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be GRANTED.

Dated: Honolulu, Hawaii, February, 1982.

Respectfully submitted,

MICHAEL A. LILLY
First Deputy Attorney General
State of Hawaii
COUNSEL OF RECORD
Attorney for Petitioners

(Appendices follow)